Vestime Corp Sdn Bhd v YBLE Resources Sdn Bhd & Ors

HIGH COURT (KUCHING) — CIVIL NO 22–169 OF 2005–I
CLEMENT SKINNER J
28 FEBRUARY 2006

Civil Procedure — Injunction — Interim injunction — Interim injunction granted to restrain first defendant from dissipating payment received — First defendant and plaintiff entered into a partnership agreement whereby they agreed to become partners to carry out, perform and complete the main contract through incorporation of sixth defendant — Main contract was to provide necessary facilities and amenities and to establish a National Service training camps for the Ministry of Defence — Dispute arises as to the dissipation of payments received and effect of partnership agreement — Whether there was bona fide triable issues to be tried — Balance of justice

Civil Procedure — Injunction — Interim injunction — Interim injunction granted to restrain first defendant from dissipating payment received — Whether delayed in coming to court for relief — Whether injunction should be set granted

Civil Procedure — Preliminary objection — First defendant and plaintiff entered into a partnership agreement whereby they agreed to become partners to carry out, perform and complete main contract through incorporation of sixth defendant — Main contract was to provide necessary facilities and amenities and to establish National Service training camps for Ministry of Defence — Addition of MINDEF as party to proceedings — Whether MINDEF a legal entity — Whether there was privity of contract to enable plaintiff to bring action or to claim any relief against MINDEF — Specific Relief Act 1950 s 26(b)

Companies and corporations — Receivership — Appointment of receiver and manager — First defendant and plaintiff entered into a partnership agreement whereby they agreed to become partners to carry out, perform and complete main contract through incorporation of sixth defendant — Main contract was to provide the necessary facilities and amenities and to establish a National Service training camps for Ministry of Defence — Dispute arose as to dissipation of payments received and effect of partnership agreement — Whether to refuse appointment of a receiver and manager would result in the sixth defendant suffering dire consequences

This was the inter partes hearing of the plaintiff's application for various reliefs including an interim injunction and the appointment of a receiver and manager. In 2003, the Government of Malaysia initiated a programme to train youth in the country called the National Service Programme which would be implemented on

behalf of the Government by the Ministry of Defence ('MINDEF'). For this purpose, National Service training camps were set up throughout the country. In Sarawak, the government decided to establish a training camp at Bukit Saban, Betong, Sri Aman Division. Accordingly, MINDEF entered into a contract with the first defendant to rent and provide the necessary facilities and amenities to set up the Bukit Saban camp site ('the main contract'). The second and third defendants are directors of the first defendant and its main shareholders. The first defendant did not have the finances to undertake the main contract. For this, the first defendant entered into a sub-contract agreement with the plaintiff ('the subcontract') in respect of the main contract. The first defendant and plaintiff entered into a partnership agreement ('the partnership agreement') whereby they agreed to become partners to carry out, perform and complete the main contract through the incorporation of a company ('the sixth defendant'). The general scheme under the partnership agreement was that while the sixth defendant would manage and execute the main contract, all moneys paid by MINDEF in respect of the main contract would be channeled into a bank account in the name of the first defendant at Bank Muamalat. It was intended that once the money from MINDEF was paid into this account, the first defendant would irrevocably instruct the bank to transfer all the funds in that account into an account in the name of the sixth defendant after which the money would be dealt with in accordance with the provisions of the partnership agreement. Subsequently, the first defendant wrote to Bank Pembangunan dan Infrastruktur Malaysia ('the fifth defendant') assigning to them the proceeds under the main contract ('the first notice of assignment'). The first defendant did not open the account at Bank Muamalat. The first defendant and the plaintiff then entered into a supplementary agreement ('the supplementary agreement'). The fifth defendant later approved the plaintiff's application for banking facilities of RM5m. The plaintiff also requested the first defendant's consent for the assignment of the proceeds of the main contract as security to obtain finance from the fifth defendant. It was the contention of the plaintiff that it applied for such facilities pursuant to cl 2.6.2 of the supplementary agreement where, according to the plaintiff, it was agreed that the plaintiff shall procure financing for the sixth defendant to manage the main contract. Following the plaintiff's request, negotiations took place between the parties about the assignment of the proceeds of the main contract. During the negotiations, the defendants showed resistance to such assignment and set certain conditions for the grant of consent including the allocation of more equity in the sixth defendant, while the plaintiff accused the first defendant of breaching the spirit of the partnership agreement. In turn the first defendant accused the plaintiff of not fulfilling its obligations under the partnership agreement. Nothing resulted from the negotiations and the first defendant subsequently gave the plaintiff 14 days' notice to comply with cl 10 of the partnership agreement to provide the required finance for the main contract. On the plaintiff's alleged failure to do so, the first defendant terminated the partnership agreement. The plaintiff did not accept the termination and disputes of the first defendant's right to do so. The first defendant commenced legal action at the High Court ('the first suit') claiming, inter alia, that the partnership agreement and the supplementary agreement have been lawfully terminated and prayed for injunctive reliefs. The first defendant obtained an interim ex parte injunction in the first suit restraining the plaintiff from disposing of or dealing with money paid by MINDEF under the main contract. The effect of the injunction obtained by the first defendant in the first suit was to freeze all the proceeds under the main contract. Following the

grant of the injunction in the first suit a meeting took place at MINDEF at which the first defendant here and the plaintiff here agreed to withdraw all allegations against each other made to the various interested parties and for the first suit and the injunction to be withdrawn. Matters between the plaintiff and the first defendant did not improve despite the meeting at MINDEF because the first defendant wrote to the plaintiff informing him that the first defendant intended to continue with the first suit and to pursue its remedies. In response the plaintiff questioned the first defendant's move and warned it against interfering at the Bukit Saban Camp site, failing which, injunctive relief and appropriate remedies would be applied for. The plaintiff alleged that unknown to it and without its consent or knowledge or that of the fifth defendant, the first defendant had written to MINDEF to cancel its earlier instructions given under its first notice of assignment, directing payment of proceeds under the main contract to the fifth defendant ('the second assignment') in favour of Bumiputra Commerce Bank whereby the first defendant assigned the proceeds from the main contract to be paid to Bumiputra Commerce Bank. On discovering what the first defendant had done the plaintiff protested to MINDEF. By this time there was some RM1,558,391.80 payable by MINDEF under the main contract in respect of the performance and execution of the main contract by the sixth defendant. Fearing that the first defendant would obtain payment from MINDEF and dissipate the RM1.5m, the plaintiff commenced this suit and applied for ex parte relief. The first, second and third defendants object to the grant of the interim injunction as well as the plaintiff's application for the appointment of a receiver and manager in respect of the sixth defendant. There were also preliminary objections raised by MINDEF as the plaintiff had named MINDEF as the fourth defendant.

Held:

(1) MINDEF is not itself a legal entity. It is only a Ministry of the Government and therefore there is no basis in law to sue it in its own name as a party to this action (see para 26). The plaintiff was a complete stranger to the main contract entered into between the first defendant and MINDEF. By the partnership agreement and supplementary agreement the plaintiff may have acquired certain rights against the first defendant concerning the main contract, in that, the subject matter of their 'joint-venture' so to speak concerned the main contract, but not being a contracting party with MINDEF (Government), the plaintiff has no legal right to enforce directly against MINDEF (Government) (see para 29).

(2) The provisions of s 26(b) of the Specific Relief Act 1950 have no application to the facts of this case. That section allows specific performance against 'any other person claiming under a party to the contract by a title arising subsequent to the contract'. MINDEF or the Government was not such a party. As far as the main contract was concerned MINDEF or the Government was a party to that agreement in its own right and did not need to claim under a party to it if it wishes to enforce any rights in the main contract. There was simply no privity of contract to enable the plaintiff to bring this action or to claim any relief against MINDEF or the Government. The plaintiff has no

cause of action against MINDEF or the Government (see para 30). MINDEF (Government) was wrongly joined as the fourth defendant in this suit (see para 33).

(3) From the totality of the facts, the issue of whether the partnership agreement and supplementary agreement had been lawfully terminated was a bona fide triable issue, which was not suitable or appropriate to decide at this stage of the case (see para 36). The assertion of the defendants regarding the validity of the sub-contract and the first notice of assignment were also not matters which were suitable to be decided at this stage of the proceedings. They gave rise to serious issues that needed to be investigated further (see para 37).

(4) Sufficient facts had been pleaded by the plaintiff to disclose a cause of action against the first defendant for breach of the partnership agreement and against the second and third defendants for breach of their fiduciary duties towards the sixth defendant. The plaintiff was not only a contracting party as far as the partnership agreement was concerned but also entitled to a 70% interest in the sixth defendant's equity. Accordingly there was no question that the plaintiff has locus standi to file this suit (see para 43).

(5) The defendants' contentions about lack of authority or that it had not given its consent to the first assignment cannot be taken into the weighing when considering the balance of justice. MINDEF was well aware of how the main contract is being carried out and where the proceeds of the main contract were being paid to because MINDEF wrote to the fifth defendant to say that it had no objection to the proceeds under the main contract being assigned to the fifth defendant. As MINDEF was well aware that the proceeds of the main contract had been assigned away and had no objection to it the point cannot be now taken by the defendants as an impediment against the grant of an injunction in this case (see para 44).

(6) While it was true that the plaintiff's statement of claim did not contain an averment that it was ready to perform its part of the contract, such an averment was in fact contained in its reply and defence to counterclaim. While it was desirable that the averment should have been made in its statement of claim, there was no possible prejudice the defendants could have suffered by the plaintiff having made the averment in its reply and defence to counterclaim. The plaintiff's pleadings was not fatally flawed (see para 46).

(7) The question of whether the partnership agreement and supplementary agreement were specifically enforceable in the light of s 54(f), s 20(1)(b) and 20(1)(g) of the Specific Relief Act 1950 were not suitable to be decided at this stage of the case (see para 50).

(8) The question of whether the partnership agreement and supplementary agreement have been validly terminated gave rise to a bona fide serious issue to be tried. Until that question is decided it would be unjust to allow the first defendant to steal a march on the plaintiff by taking over the camp site and behaving as if the partnership agreement and supplementary agreement has in fact been terminated and causing difficulties to the sixth defendant in performing the main contact. Even though it may have been the first defendant who made available the camp site to MINDEF under the main contract,

the question of maintaining security at the camp site should be a matter for the sixth defendant who operates and manages the main contract on behalf of both the plaintiff and first defendant. It was wrongful for the first defendant to take over possession of the camp site from the sixth defendant who has been given possession of it by virtue of the partnership agreement and supplementary agreement (see para 52).

(9) The plaintiff had not delayed in coming to court for relief. It must not be overlooked that despite the first defendant having allegedly terminated the partnership agreement on 21 January 2005, and thereafter withdrawing all its allegations against the plaintiff including the first suit, but deciding on 6 May 2005 to continue with the first suit, the first defendant did not take any steps to divert the proceeds of the main contract until 3 August 2005 when it wrote to MINDEF to cancel the first notice of assignment, but this was not known to the plaintiff. The plaintiff only discovered the first defendant's attempt to divert the money on 2 September 2005. But what was of importance was that on learning of the first defendant's attempt to divert the moneys, the plaintiff did not remain silent or sit on its rights. The plaintiff immediately protested to MINDEF in the strongest possible terms. It wrote two letters to MINDEF on 19 September 2005 and 21 October 2005. It was after 11 November 2005 when the first defendant wrote to the plaintiff stating that it (the first defendant) had terminated its relationship with the sixth defendant and that the sixth defendant 'has no longer any authority to deal with and/or manage' the main contract that the plaintiff sought the protection of the court (see para 60).

(10) The parties had agreed for the sixth defendant to operate and manage the main contract. It had been doing so and by all accounts, it had done so successfully because if it had not, MINDEF would not pay out the large sums of money it has under the main contract. But the first defendant had embarked on a course of action which would prevent the sixth defendant from carrying out the main contract. It had taken steps to divert the proceeds of the main contract into its own account and in effect away from the sixth defendant. It had also taken over possession of the camp site. Given the above situation, on the totality of the facts, if the defendants were not restrained from diverting the proceeds under the main contract to their own account and the status quo was not restored to the situation that prevailed at the camp site before the first defendant took it over, then far greater harm would result by the refusal of the injunction sought than by its grant. The injunction to the plaintiff was granted (see para 61–62).

(11) To refuse the appointment of a receiver and manager simply because the plaintiff has not asked for a dissolution of the partnership business would result in the sixth defendant suffering dire consequences. It would leave the sixth defendant in a precarious position since the affairs of the sixth defendant were in a situation of deadlock with the ongoing dispute and impasse between the plaintiff and defendants. The operations of the sixth defendant will be severely affected if it is starved of funds to manage and operate the main contract. Not only will the existence of the sixth defendant be placed in jeopardy, so too will the main contract if the sixth defendant cannot function effectively and

efficiently in providing the services and amenities required under the main contract. If the sixth defendant is forced to cease its operations there is a danger that the main contract will be lost forever to the partnership business. As the sixth defendant was not at any fault in this whole dispute and it is the party that is earning the proceeds under the main contract, it is imperative to keep it as a going concern by the appointment of a receiver and manager (see para 66).

[Bahasa Malaysia summary

Ini merupakan perbicaraan inter parte permohonan plaintif bagi pelbagai relif termasuklah injunksi interim dan pelantikan penerima dan pengurus. Pada tahun 2003, Kerajaan Malaysia telah memulakan satu program untuk melatih anak muda dalam negara dipanggil Program Khidmat Negara yang akan dilaksanakan bagi pihak kerajaan oleh Kementerian Pertahanan ('MINDEF'). Bagi tujuan ini, kem-kem latihan Khidmat Negara telah ditubuhkan di seluruh negara. Di Sarawak, pihak kerajaan telah memutuskan untuk menubuhkan satu kem latihan di Bukit Saban, Betong, Bahagian Sri Aman. Sewajarnya, MINDEF telah memasuki kontrak dengan defendan pertama untuk menyewa dan menyediakan kemudahan dan peralatan am untuk mendirikan tapak kem Bukit Saban ('kontrak utama'). Defendan pertama dan kedua adalah pengarah-pengarah defendan pertama dan pemegang-pemegang saham utamanya. Defendan pertama tidak mempunyai kewangan untuk melaksanakan kontrak utama. Untuk ini, defendan pertama telah memasuki perjanjian subkontrak dengan plaintif ('subkontrak') berkenaan dengan kontrak utama. Defendan pertama dan plaintif telah memasuki perjanjian perkongsian ('perjanjian perkongsian') di mana mereka bersetuju untuk menjadi pekongsi untuk melaksanakan dan melengkapkan kontrak utama melalui penggabungan syarikat ('defendan keenam'). Skim am di bawah perjanjian perkongsian adalah, di mana, defendan keenam akan mengendalikan dan melaksanakan kontrak utama, semua wang yang dibayar oleh MINDEF berkenaan kontrak utama akan disalurkan ke dalam akaun bank atas nama defendan pertama di Muamalat Bank. Adalah niat bahawa sejurus selepas wang daripada MINDEF dibayar ke dalam akaun ini, defendan pertama akan mengarahkan bank untuk memindahkan kesemua kewangan di dalam akaun ini ke dalam satu akaun di bawah nama defendan keenam, di mana, selepas itu, wang akan dikendalikan berikutan dengan peruntukan-peruntukan perkongsian perjanjian. Kemudiannya, defendan pertama telah menulis kepada Bank Pembangunan dan Infrastruktur Malaysia ('defendan kelima') memperuntukkan kepada mereka hasil di bawah kontrak utama ('notis pertama peruntukkan'). Defendan pertama tidak membuka akaun di Bank Muamalat. Defendan pertama dan plaintif, kemudiannya telah memasuki perjanjian tambahan. Defendan kelima kemudiannya telah bersetuju dengan permohonan plaintif bagi kemudahan perbankan RM5j. Plaintif juga telah meminta persetujuan defendan pertama tentang peruntukkan hasil kontrak utama sebagai sekuriti untuk mendapatkan kewangan daripada defendan kelima. Adalah merupakan pendapat plaintif bahawa ia memohon untuk sesuatu kemudahan berikutan kl 2.6.2 perjanjian tambahan, di mana, menurut plaintif telah dipersetujui bahawa plaintif telah mendapatkan kewangan bagi defendan keenam untuk mengendalikan kontrak utama. Berikutan permintaan plaintif, perundingan telah diadakan antara parti-parti tentang peruntukkan hasil

kontrak utama. Semasa perundingan, defendan telah menunjukkan sikap menentang terhadap peruntukkan tersebut dan telah menetapkan beberapa syarat bagi mendapatkan persetujuan termasuk pengagihan lebih ekuiti dalam defendan keenam, manakala, plaintif telah menuduh defendan pertama mengingkari semangat perjanjian perkongsian. Sebagai balasan, defendan pertama telah menuduh plaintif tidak mematuhi obligasinya di bawah perjanjian perkongsian. Tiada apa-apa hasil daripada perundingan tersebut dan defendan pertama kemudiannya telah memberikan plaintif notis 14 hari untuk memenuhi kl 10 perjanjian perkongsian untuk memberikan kewangan yang diperlukan bagi kontrak utama. Berdasarkan kegagalan plaintif untuk berbuat demikian, defendan pertama telah membatalkan perjanjian perkongsian. Plaintif tidak menerima pembatalan dan pertelingkahan hak defendan pertama berbuat demikian. Defendan pertama telah memulakan tindakan undang-undang di Mahkamah Tinggi ('guaman pertama') menuntut, inter alia, bahawa perjanjian perkongsian dan perjanjian tambahan telah sah dibatalkan dan memohon untuk relif injunksi. Defendan pertama telah memperoleh ex parte interim injunksi di dalam guaman pertama menyekat plaintif daripada menghapuskan atau mengendalikan wang yang dibayar oleh MINDEF di bawah kontrak utama. Kesan injunksi yang diperoleh oleh defendan pertama dalam guaman pertama adalah untuk membeku kesemua hasil di bawah kontrak utama. Berikutan dengan pemberian injunksi dalam guaman pertama, suatu mesyuarat telah diadakan di MINDEF, di mana, defendan pertama dan plaintif telah bersetuju untuk menarik balik kesemua tuduhan terhadap satu sama lain yang dibuat kepada pelbagai parti dan bagi guaman pertama dan injunksi untuk ditarik balik. Perkara antara plaintif dan defendan pertama tidak bertambah baik sungguhpun terdapat mesyuarat di MINDEF kerana defendan pertama telah menulis kepada plaintif memaklumkannya tentang niat defendan pertama untuk meneruskan guaman pertama dan meneruskan remedi-remedinya. Dalam balasan, plaintif telah menyoal pergerakan defendan pertama dan telah memberi amaran terhadap campur tangan di tempat perkhemahan Bukit Saban, di mana, jikalau gagal, injunksi relif dan remedi-remedi yang sesuai akan dipohon. Plaintif mengatakan bahawa tanpa diketahui dan tanpa persetujuan/pengetahuan defendan kelima, defendan pertama telah menulis kepada MINDEF untuk membatalkan arahan awal yang diberikan di bawah tugasan notis pertama, mengarahkan hasil daripada bayaran di bawah kontrak utama kepada defendan kelima ('tugasan kedua') dalam menyokong Bumiputra Commerce Bank, di mana, defendan pertama telah menyerahkan hasil daripada kontrak utama untuk dibayar kepada Bumiputra Commerce Bank. Dalam menyedari apa yang telah dilakukan oleh defendan pertama, plaintif telah membantah kepada MINDEF. Pada masa ini, terdapat RM1,558,391.80 yang perlu dibayar oleh MINDEF di bawah kontrak utama, berkenaan, pelaksanaan kontrak utama oleh defendan keenam. Memandangkan defendan pertama akan mendapatkan bayaran daripada MINDEF dan melenyapkan RM1.5j, plaintif telah memulakan guaman ini dan memohon ex parte relif. Defendan pertama, kedua dan ketiga membantah terhadap pemberian interim injunksi dan juga permohonan plaintif bagi pelantikan satu penerima dan pengurus, berkenaan dengan defendan keenam. Terdapat pertanyaan awal yang telah dibangkitkan oleh MINDEF seperti mana plaintif telah menamakan MINDEF sebagai defendan keempat.

A B C D E F G H I

Diputuskan:

(1) MINDEF bukanlah satu entiti sah. Ia hanyalah merupakan satu Kementerian Kerajaan dan oleh itu tidak ada asas undang-undang untuk mendakwanya dalam nama sendiri sebagai parti kepada tindakan ini (lihat perenggan 26). Plaintif merupakan orang asing kepada kontrak utama yang dimasukkan di antara defendan pertama dan MINDEF. Melalui perjanjian perkongsian dan perjanjian tambahan, plaintif mungkin memperoleh hak-hak terhadap defendan pertama berkenaan kontrak utama, di mana, subjek perkara mereka 'usaha sama' adalah berkenaan kontrak utama tetapi bukan satu kontrak dengan MINDEF (Kerajaan), plaintif tidak mempunyai hak undang-undang untuk melaksanakan secara terusnya terhadap MINDEF (Kerajaan) (lihat perenggan 29).

(2) Peruntukan s 26(b) Akta Relif Spesifik 1950 tidak mempunyai sebarang aplikasi terhadap fakta-fakta kes ini. Seksyen tersebut membenarkan pelaksanaan spesifik terhadap sebarang orang yang menuntut di bawah parti kepada kontrak tersebut melalui tajuk yang dibangkitkan, kemudiannya terhadap kontrak. MINDEF atau Kerajaan bukan satu parti kepada perjanjian di dalam haknya tersendiri dan tidak perlu menuntut di bawah parti jika ia menginginkan untuk melaksanakan sebarang hak-hak di dalam kontrak utama. Tidak ada sebarang kontrak priviti untuk membolehkan plaintif membawa tindakan atau menuntut sebarang relif terhadap MINDEF atau Kerajaan (lihat perenggan 30). Plaintif tidak mempunyai kuasa tindakan terhadap MINDEF atau Kerajaan. MINDEF (Kerajaan) telah dengan salahnya bersatu dengan defendan keempat di dalam guaman ini (lihat perenggan 33).

(3) Pada fakta-fakta keseluruhannya, isu sama ada perjanjian perkongsian dan perjanjian tambahan telah dibatalkan di bawah undang-undang merupakan satu isu perbicaraan bona fide, yang mana, tidak sesuai untuk ditentukan pada tahap kes ini (lihat perenggan 36). Kenyataan defendan-defendan berkenaan kesahan sub-kontrak dan notis pertama serahhak adalah juga bukan perkara-perkara yang sesuai diputuskan pada tahap prosiding ini. Perkara-perkara ini membangkitkan isu-isu serius yang perlu diselidik lebih (lihat perenggan 37).

(4) Fakta-fakta yang mencukupi telah diplidkan oleh plaintif untuk mendedahkan kuasa tindakan terhadap defendan pertama bagi pengingkaran perkongsian dan terhadap defendan kedua dan ketiga bagi pengingkaran tugas-tugas fidusiari kepada defendan keenam. Plaintif bukan sahaja parti kepada kontrak pengikatan tersebut selagi sehubungan dengan perjanjian perkongsian tetapi juga berhak kepada 70% bunga dalam ekuiti defendan keenam. Berikutan itu, tidak terdapat persoalan bahawa plaintif mempunyai locus standi untuk memfailkan guaman ini (lihat perenggan 42).

(5) Perbalahan defendan tentang kekurangan kuasa ataupun ia tidak memberikan persetujuan kepada tugasan pertama tidak boleh diambil dalam pertimbangan semasa menentukan imbangan keadilan. MINDEF menyedari bagaimana kontrak utama dijalankan dan di mana hasil daripada kontrak utama dibayar kerana MINDEF telah menulis kepada defendan kelima untuk menyatakan bahawa ia tidak mempunyai bantahan terhadap hasil daripada kontrak utama

diberikan kepada defendan kelima. Seperti mana MINDEF menyedari bahawa hasil daripada kontrak utama telah diberikan dan tiada bantahan kepadanya, perkara tersebut tidak boleh sekarang diambil oleh defendan-defendan sebagai satu penghalang terhadap pemberian injunksi di dalam kes ini (lihat perenggan 44).

(6) Di mana adalah benar bahawa pernyataan tuntutan tidak mengandungi sebarang penegasan bahawa ia sudah sedia melaksanakan bahagiannya dalam kontrak, penegasan tersebut memang terkandung di dalam balasannya dan pembelaan terhadap tuntutan balas. Di mana penegasan tersebut adalah perlu di dalam pernyataan tuntutan, tidak ada kemungkinan sebarang prejudis yang dialami oleh defendan oleh plaintif dalam membuat penegasan tersebut di dalam balasannya dan pembelaan terhadap tuntutan balas. Pliding plaintif tidak sepenuhnya cacat (lihat perenggan 46).

(7) Persoalan sama ada perjanjian perkongsian dan perjanjian tambahan telah dilaksanakan spesifik dalam s 54(f), s 20(1) (b) dan 20(1)(g) Akta Relif Spesifik 1950 adalah tidak sesuai untuk diputuskan pada tahap kes ini (lihat perenggan 50).

(8) Persoalan sama ada perjanjian perkongsian dan perjanjian tambahan telah dengan sah dibatalkan telah membangkitkan isu perbicaraan bona fide. Sehingga persoalan tersebut diputuskan, adalah menjadi tidak adil untuk membenarkan defendan pertama untuk mencuri kawat ke atas plaintif dengan mengambil alih tempat perkhemahan dan berkelakuan seperti perjanjian perkongsian dan perjanjian tambahan telah dibatalkan dan menyebabkan kesusahan kepada defendan keenam dalam melaksanakan kontrak utama. Walau bagaimanapun, ia mungkin adalah defendan pertama yang telah melapangkan tempat perkhemahan kepada MINDEF di bawah kontrak utama, persoalan untuk mengekalkan sekuriti di tempat perkhemahan merupakan satu perkara bagi defendan keenam untuk beroperasi dan menguruskan kontrak utama ke atas pihak plaintif dan defendan pertama. Adalah salah bagi defendan pertama untuk mengambil alih pemilikan tempat perkhemahan daripada defendan keenam yang telah diberikan pemilikan melalui satu perjanjian perkongsian dan perjanjian tambahan (lihat perenggan 52).

(9) Plaintif tidak berlengah datang ke mahkamah bagi relif. Ia tidak boleh diendahkan bahawa selain daripada defendan pertama yang membatalkan perjanjian perkongsian pada 21 Januari 2005 dan kemudiannya menarik balik kesemua tuduhan terhadap plaintif termasuk guaman pertama tetapi memutuskan pada 6 Mei 2005 untuk meneruskan dengan guaman pertama, defendan pertama tidak mengambil sebarang tindakan untuk melencongkan hasil daripada kontrak utama sehingga 3 Ogos 2005 apabila menulis kepada MINDEF untuk membatalkan notis pertama tugasan tetapi ini tidak dimaklumkan kepada plaintif. Plaintif hanya menemui percubaan defendan pertama untuk melencongkan wang pada 2 September 2005. Tetapi apa yang penting adalah dalam mengetahui percubaan defendan pertama untuk melencongkan kesemua wang, plaintif tidak berdiam diri atau duduk atas hak-haknya. Plaintif dengan serta-merta telah menentang terhadap MINDEF dalam percubaannya. Ia telah menulis dua surat kepada MINDEF pada

19 Sepember 2005 dan 21 Oktober 2005. Hanya selepas 11 November 2005 apabila defendan pertama telah menulis kepada plaintif menyatakan bahawa ia (defendan pertama) telah membatalkan perhubungan dengan defendan keenam dan bahawa defendan keenam tidak mempunyai sebarang kuasa untuk mengendalikan dan/atau menguruskan kontrak utama bahawa plaintif telah meminta perlindungan mahkamah (lihat perenggan 60).

(10) Pihak-pihak telah bersetuju bagi defendan keenam untuk mengendalikan dan menguruskan kontrak utama. Ia telah berbuat demikian dan melalui kesemua dan telah melakukannya dengan baik sekali kerana jikalau tidak MINDEF tidak akan membayar wang yang banyak sekali yang ada di bawah kontrak utama. Tetapi defendan pertama telah memulakan satu kuasa tindakan yang akan menghalang defendan keenam daripada melaksanakan kontrak utama. Ia telah mengambil langkah-langkah untuk melencongkan hasil daripada kontrak utama ke dalam akaunnya yang tersendiri dan di luar daripada defendan keenam. Ia telah mengambil alih pemilikan tempat perkhemahan. Dalam memberi situasi di atas, di dalam keseluruhan fakta-fakta, jikalau defendan tidak menahan daripada melencongkan hasil daripada kontrak utama kepada akaun mereka tersendiri dan status quo tidak ditempatkan semula kepada situasi tersebut yang mengatasi tempat perkhemahan sebelum defendan pertama mengambilnya semula, defendant keenam maka keadaan yang lebih memudaratkan akan terjadi melalui keengganan injunksi yang diminta daripada yang diberikan. injunksi kepada plaintif diberikan (lihat perenggan 61–62).

(11) Dalam menolak pelantikan penerima dan pengurus hanya kerana plaintif tidak menanya satu pembubaran perkongsian perniagaan akan mengakibatkan defendan keenam mengalami kesukaran. Ia akan meletakkan defendan keenam dalam keadaan bahaya memandangkan keadaan defendan keenam adalah dalam situasi buntu dengan pertelingkahan yang berterusan antara plaintif dan defendan-defendan. Operasi defendan keenam akan tergugat jika ia kekurangan wang untuk mengurus dan melaksanakan kontrak utama. Bukan sahaja kewujudan defendan keenam akan berada dalam keadaan bahaya sama juga dengan kontrak utama jikalau defendan keenam tidak boleh beroperasi dengan baik sekali dalam memberi khidmat dan kemudahan yang diperlukan di bawah kontrak utama. Jikalau defendan keenam dipaksa habiskan operasinya, terdapat bahaya bahawa kontrak utama akan kehilangan selamanya kepada perkongsian perniagaan. Seperti mana defendan keenam tidak boleh dipersalahkan untuk sebarang kesalahan di dalam pertelingkahan ini dan ia adalah pihak yang memperoleh hasil daripada kontrak utama, adalah penting untuk disedari melalui pelantikan penerima dan pengurus (lihat perenggan 66).]

Notes

For cases on interim injunction, see 2(1) *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 2769–2830.

For the case on preliminary objection generally, see 2(1)*Mallal's Digest* (4th Ed) Consolidated Subject Index paras 5192–5217.

For cases on appoinment of receiver and manager, see 3(1) (4th Ed, 2003 Reissue) paras 553–554.

Cases referred to

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (refd)

Sabil Mulia (M) Sdn Bhd v Pengarah Hospital Tengku Ampuan Rahimah & Ors [2005] 3 MLJ 235 (refd)

Si Rusa Beach Resort Sdn Bhd v Asia Pacific Hotels Management Pte Ltd [1985] 1 MLJ 132 (refd)

TSB Private Bank International SA v Chabra & Anor [1992] 1 WLR 231 (refd)

Legislation referred to

Specific Relief Act 1950 ss 20(1)(a), (b), (g), 26(b), 54(f)
Government Proceedings Act s 29
Rules of High Court 1980 O 30 rr 4, 5

Shankar Ram (Francis Teron with him) (Thomas Shankar Ram & Co) for the plaintiff.
Satinder Singh Sandhu (Sandhu & Co) for the first, second and third defendants.
Mohd Taufik bin Mohd Yusoff (Federal Counsel, Attorney General's Chambers) for the fourth defendant.
Cila Nasu (Dr Yaacob & Ismail Advocates) for the fifth defendant.

Clement Skinner J:

[1] This is the inter partes hearing of the plaintiff's application for various reliefs including an interim injunction and the appointment of a receiver and manager. On 19 December 2005, I granted, on ex-parte application by the plaintiff, an injunction in the following terms:

> An order that the first, second and third defendants be restrained and an injunction be hereby granted restraining the first, second and third defendants until inter partes hearing or further order or until trial/ judgment whether by their agents, servants, directors or any other means howsoever from receiving the proceeds of payments from the fourth defendant under the main contract.

[2] This is now the inter partes hearing of the plaintiff's application for the reliefs sought. The facts giving rise to this application are these.

[3] In 2003, the Government of Malaysia initiated a programme to train youth in the country called the National Service Programme which would be implemented on behalf of the Government by the Ministry of Defence ('MINDEF'). For this purpose National Service training camps were set up throughout the country. Under the programme, the government would provide the instructors and trainers but the camp site at which the training would take place and all the infrastructure and facilities at the camp site, such as training courses, barracks and amenities would be procured and rented from third parties. For this purpose, National Service training camps were set up throughout the country. Under the programme, the government would provide the instructors and trainers but the camp site at which the training would take place and all the infrastructure and facilities at the camp site, such as training courses, barracks and amenities would be procured and rented from third parties.

[4] In Sarawak, the government decided to establish a training camp at Bukit Saban, Betong, Sri Aman Division. Accordingly, on 7 November 2003, MINDEF entered into a contract with YBLE Resources Sdn Bhd ('the first defendant') to rent and provide the necessary facilities and amenities to set up the Bukit Saban camp site ('the main contract'). Very briefly, under the main contract, the first defendant would for a period of five years provide two lots of land as a site for the training as well as all the infrastructure, equipment, facilities and amenities mentioned in the agreement in return for which MINDEF would pay the first defendant various sums of money, at the times specified in the agreement.

[5] I will now introduce some of the personalities in this suit. Awang Mohd bin Awang Bunsu and Nafsiah bte Mohd Sa'ed are husband and wife. They are named as the second and third defendants in this action. They are directors of the first defendant and its main shareholders. The first defendant did not have the finances to undertake the main contract. For this, the second and third defendants approached a company called Vestime Corporation Sdn Bhd, the plaintiff herein, through one Rosman bin Abu Samah who is related by marriage to them. He is also the Managing Director of Vestime Corporation Sdn Bhd. The approach was apparently made before the first defendant was awarded the main contract by MINDEF. On 8 November 2003, that is one day after the main contract was awarded to the first defendant, the first defendant entered into a sub-contract agreement with the plaintiff ('the subcontract') in respect of the main contract. According to the plaintiff, the parties did not intend to act on this sub-contract but it was to be used as a means of raising financing to enable the first defendant and the plaintiff to undertake the main contract as a partnership business. This is now disputed by the first, second and third defendants who say the sub-contract agreement is invalid and void. Be that as it may, on 3 March 2004, the first defendant and plaintiff entered into a partnership agreement ('the partnership agreement') whereby they agreed to become partners to carry out, perform and complete the main contract through the incorporation of a company called Pati Usaha Sdn Bhd ('the sixth defendant'). In the partnership agreement,the parties agreed that the shareholding in the sixth defendant should be as follows:

first defendant……..30%

plaintiff……70%

while the Board of Directors of the sixth defendant shall consist of five persons, with three directors appointed by the plaintiff and two directors appointed by the first defendant.

[6] The general scheme under the partnership agreement was that while the sixth defendant would manage and execute the main contract, all moneys paid by MINDEF in respect of the main contract would be channeled into a bank account in the name of the first defendant at Bank Muamalat. This account was described by the parties as a 'non-checking account' because it was intended by the parties that no cheques could be drawn on this account by either party. It was intended that once the money from MINDEF was paid into this 'non-checking account', the first defendant would irrevocably instruct the bank to transfer all the funds in that

account into an account in the name of the sixth defendant at Bank Muamalat after which the money would be dealt with in accordance with the provisions of the partnership agreement.

[7] After the main contract was placed in the hands of the sixth defendant, it performed its duties under the partnership agreement because soon moneys under the main contract became payable to the first defendant but it seems that from the very start the parties experienced difficulties with each other over money matters concerning the main contract. Accusations and counter accusations have been traded between the plaintiff and first, second and third defendants over the same and it is not possible nor desirable at this stage to express any view on these accusations, but from this tangled web of accusations, I will try to set out certain events that took place regarding money payable under the main contract.

[8] On 23 February 2004, the first defendant wrote to Bank Pembangunan dan Infrastruktur Malaysia ('the fifth defendant') assigning to them the proceeds under the main contract ('the first notice of assignment'). On the strength of this assignment, it seems the fifth defendant approved banking facilities of RM3m to the plaintiff. The first, second and third defendants deny the validity of this assignment or any knowledge of it.

[9] The first defendant did not open the non-checking account at Bank Muamalat because it alleges that the bank would not allow such an account to be opened. The first defendant and the plaintiff then entered into a supplementary agreement on 21 April 2004 ('the supplementary agreement'). So far as relevant to these proceedings under the supplementary agreement the first defendant was given a choice of either opening a 'non-checking' account or a joint signatory account so that moneys from MINDEF could be paid into such account. Initially the first defendant did not set up any account as envisioned but did so on 21 September 2004 by opening a joint signatory (with the plaintiff) account No 1101-0001264-719 at Bank Muamalat. Payments from MINDEF were supposed to be paid into this account but the defendants say this account has remained dormant.

[10] Even after the supplementary agreement was entered into, difficulties continued to exist between the parties over money matters. On or about 20 October 2004, the fifth defendant approved the plaintiffs application for banking facilities of RM3m.. According to the plaintiff, this is the same facility approved earlier on 30 March 2004 to it by the fifth defendant but with amended terms. On 22 October 2004, the plaintiff requested the first defendant's consent for the assignment of the proceeds of the main contract as security to obtain finance from the fifth defendant. It is the contention of the plaintiff that it applied for such facilities pursuant to cl 2.6.2 of the supplementary agreement where, according to the plaintiff, it was agreed that the plaintiff shall procure financing for the sixth defendant to manage the main contract. Following the plaintiff's request, negotiations took place between the parties between 22 October 2004 to 29 December 2004 about the assignment of the proceeds of the main contract. During the negotiations, the defendants showed resistance to such assignment and set certain conditions for the grant of consent including the allocation of more equity in the sixth defendant, while the plaintiff

A accused the first defendant of breaching the spirit of the partnership agreement. In turn, the first defendant accused the plaintiff of not fulfilling its obligations under the partnership agreement. Nothing appears to have resulted from the negotiations because on 29 December 2004, the first defendant gave the plaintiff 14 days' notice to comply with cl 10 of the partnership agreement to provide the required finance for
B the main contract. On 12 January 2005, on the plaintiff's alleged failure to do so, the first defendant (through its advocates) terminated the partnership agreement. The plaintiff does not accept the termination and disputes the first defendant's right to do so.

C **[11]** By December of 2004, substantial sums of money were payable under the main contract. On 15 January 2005, the first defendant wrote to MINDEF instructing the later to pay all proceeds due under the main contract to the first defendant's account No 1102-000-1929-05-3 at Bumiputra-Commerce Bank. This is not a joint signatory account with the plaintiff but operated solely by the first
D defendant.

[12] On 17 January 2005, the plaintiff's Kuala Lumpur solicitors wrote to the first defendant's lawyers complaining of bad faith on the part of the first defendant in trying to close the joint signatory account of the first defendant at Bank Muamalat.

E

[13] On 26 February 2005, the first defendant says it discovered that the proceeds of the main contract had been assigned to the fifth defendant without their knowledge and consent. This allegation is denied by the plaintiff who says that the first defendant was aware that the sub-contract agreement entered into between the
F plaintiff and first defendant one day after the main contract was awarded to the first defendant had been entered into for the purpose of procuring financing for the partnership business and that the first notice of assignment dated 23 February 2004, to enable the proceeds of the main contract to be paid to the fifth defendant was signed by one Awangku Mohd Salleh bin Pengiran Syed Shahminan who was formerly a director of the first defendant who has come forward to say on affidavit
G in these proceedings that the first, second and third defendants were fully aware of him doing so and had agreed to it, although this is now denied by the first, second and third defendants.

[14] On 3 March 2005, MINDEF wrote to the fifth defendant to say that it had
H no objection to the proceeds under the main contract being assigned to the fifth defendant and that such payment was supported by a notice of assignment (ie the first notice of assignment) signed by the first defendant dated 23 February 2004.

[15] The dispute between the plaintiff and the first defendant over moneys payable
I under the main contract came to a head when the first defendant commenced legal action at the High Court in Kuching vide Suit No 22-27-2005-111(1) ('the first suit') on 9 March 2005 claiming, inter alia, that the partnership agreement and the supplementary agreement have been lawfully terminated and praying for injunctive reliefs. On the same day, ie 9 March 2005, the first defendant here (as plaintiff in that suit) obtained an interim ex parte injunction in the first suit restraining the plaintiff

here (as defendant there) from disposing of or dealing with money in the joint account No 1101-0001264-719 at Bank Muamalat or money paid to it by MINDEF under the main contract.

[16] The effect of the injunction obtained by the first defendant here in the first suit was to freeze all the proceeds under the main contract. Following the grant of the injunction in the first suit a meeting took place at MINDEF on the 14 March 2005 at which the first defendant here and the plaintiff here agreed to withdraw all allegations against each other made to the various interested parties and for the first suit and the injunction to be withdrawn.

[17] On the same day, ie 14 March 2005, following the resolution of the differences between the first defendant and plaintiff, MINDEF wrote a letter to the first defendant here to say that MINDEF had no objection to the payment of proceeds under the main contract being made directly to the fifth defendant and that MINDEF would treat the first defendant's request (in its letter of 22 February 2005) for the proceeds to be paid to Bumiputra Commerce Bank as cancelled.

[18] Following the resolution of their differences at MINDEF, the following sums of money representing proceeds of the main contract were dealt with in the following manner:

(a) on 17 March 2005, RM663,369.50 earlier paid by MINDEF to the fifth defendant was released to a joint savings account in the name of Rosman Abu Samah and Awang Mohd bin Awang Bunsu (second defendant) at Affin Bank MINDEF Branch, Kuala Lumpur;

(b) on 18 April 2005, RM708,202.60 was paid by MINDEF into the fifth defendant's account and thereafter fifth defendant paid this sum into the joint savings account of the two persons mentioned in (a) above;

(c) on 16 May 2005, RM355,225.40 was paid by MINDEF into the fifth defendant's account who thereafter paid the amount into the plaintiff's account at Bank Muamalat, Shah Alam. According to the plaintiff this sum was utilised to pay all creditors, suppliers and expenses under the main contract;

(d) between March, April and May 2005 the plaintiff collected three other payments from MINDEF ie for RM412,085.50, RM638,555.00 and RM664,706.70 respectively which the first defendant alleges was not deposited into the sixth defendant's account ie A/C No 1101-0001160-71-7 at Bank Muamalat.

[19] Matters between the plaintiff and first defendant did not improve despite the meeting at MINDEF because on 6 May 2005, the first defendant, through its lawyers, wrote to the plaintiff informing it that the first defendant intended to continue with the first suit and to pursue its remedies there. In response, the plaintiff, through its then lawyer, questioned the first defendant's move and warned it against interfering at the Bukit Saban Camp site, failing which injunctive relief and appropriate remedies would be applied for.

[20] The plaintiff alleges that unknown to it and without its consent or knowledge or that of the fifth defendant, the first defendant had written to MINDEF on 3 August 2005 to cancel its earlier instructions given under its first notice of assignment, directing payment of proceeds under the main contract to the fifth defendant. The plaintiff apparently found out about what the first defendant had done when it received a letter dated 2 September 2005 from MINDEF informing it of the first defendant's instructions. It seems that the first defendant had executed a document referred to as an 'Assignment of Right' ('the second assignment') in favour of Bumiputra Commerce Bank whereby the first defendant assigned the proceeds from the main contract to be paid to Bumiputra Commerce Bank. This much at least can be deduced from a letter dated 2 September 2005 written by MINDEF to Bumiputra-Commerce Bank in which MINDEF refers to a letter dated 8 August 2005 from the bank and gives its (MINDEF's) consent to the first defendant assigning its rights under the main contract to Bumiputra-Commerce Bank.

[21] On discovering what the first defendant had done, the plaintiff protested to MINDEF. In its letters of 19 September 2005 and 21 October 2005 to MINDEF the plaintiff protested against MINDEF's refusal to continue making payment to the fifth defendant; it also protested against MINDEF consenting to the second assignment made by the first defendant. The plaintiff insisted that MINDEF should continue paying the proceeds of the main contract to the fifth defendant. It was the plaintiff's stand that the second assignment was unlawful.

[22] Following the plaintiff's protests and objections, MINDEF made two further payments to the fifth defendants. On 25 October 2005, it paid a sum of RM483,973.00 and RM180,733.70 respectively to the fifth defendant. In making these payments it seems MINDEF was in effect honouring the earlier first notice of assignment issued to it by the first defendant.

[23] On 11 November 2005, the first defendant wrote to the plaintiff informing the latter that it (the first defendant) had terminated the partnership agreement and the supplementary agreement on 12 January 2005 and therefore, according to the first defendant, its relationship with the sixth defendant had also terminated. The first defendant went on to state in its letter that the sixth defendant 'has no longer any authority to deal with and/or manage' the main contract. By this time, there was some RM1,558,391.80 payable by MINDEF under the main contract in respect of the performance and execution of the main contract by the sixth defendant. Fearing that the first defendant would obtain payment from MINDEF and dissipate the RM1.5m, the plaintiff commenced this suit on 19 December 2005 and applied for ex parte relief in the terms earlier mentioned.

[24] The first, second and third defendants object to the grant of the interim injunction as well as the plaintiff's application for the appointment of a receiver and manager in respect of the sixth defendant, and says the ex parte injunction should be discharged immediately. I will deal with the grounds relied upon by the defendants shortly, but first I must address certain preliminary objections raised by MINDEF.

[25] The plaintiff named MINDEF as the fourth defendant in this suit. At the inter partes hearing, Federal Counsel Encik Taufik bin Mohd Yusoff appeared on behalf of MINDEF and raised a preliminary objection to its being joined as a defendant. He applied for MINDEF to be struck out as a party to this action. Encik Taufik relies on three grounds to do so:

(a) the Ministry of Defence Malaysia' which is the description of the party that has been cited as fourth defendant, is not a legal entity;

(b) any order of injunction granted against the first, second and third defendants would be tantamount to granting an indirect injunction against the Government which is not permissible in law;

(c) the plaintiff has no locus standi to bring this suit against MINDEF or the Government since it has no privity of contract with the Government.

[26] I agree with Encik Taufik that MINDEF is not itself a legal entity — it is only a Ministry of the Government and therefore there is no basis in law to sue it in its own name as a party to this action. Mr Shankar Ram of counsel for the plaintiff concedes this point but says it is not fatal to the plaintiff's action as the plaintiff can amend its writ and statement of claim to name the proper party to this action which is the Government of Malaysia, which the plaintiff has in fact done by filing an application to amend in the course of this hearing. It is correct that the plaintiff can apply to join the Government as the correct party but for the reasons that appear shortly, I think such a step will serve no purpose.

[27] With regard to Encik Taufik's second point, for which he relies heavily on s 29 of the Government Proceedings Act 1956 in support of his contention, I cannot agree with it. In the first place, the orders sought are to restrain the first, second and third defendants only and not the Government. I do not think there is any legal impediment against obtaining an injunction against them even though the first defendant has entered into a transaction with the Government and, therefore, the Government is affected indirectly by the injunction. In *Sabil Mulia (M) Sdn Bhd v Pengarah Hospital Tengku Ampuan Rahimah & Ors* [2005] 3 MLJ 325, it was held that s 29 of the Government Proceedings Act 1956 is not an impediment to restraining a private defendant from entering into a transaction with the Government. Secondly, even if the injunction granted the first, second and third defendants affect the Government, it does so only temporarily until the disposal of this suit and there is no prohibition against the grant of a temporary injunction against the Government. In *Sabil Mulia*at p 336, Gopal Sri Ram JCA stated that:

> It has been settled since at least 1978 that s 29 of the 1956 Act (ie the Government Proceedings Act) *does not prohibit the grant of temporary injunctions* against the Government. In *Tengku Haji Jaafar & Anor v Government of the State of Pahang* [1978] 2 MLJ 105 it was held that the section 'does not take away therefore the right of the court to grant an interlocutory injunction'. This court in *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1 treated the ratio in Tengku Haji Jaafar & Anor v Government of the State of Pahang [1978] 2 MLJ 105 treated the ratio in *Tengku Haji Jaafar & Anor v Government of the State of Pahang* as settled law. Although the Federal Court reversed our decision in that case on the constitutional point, our judgment on this point was approved sub silento.

Accordingly, it is too late in the day to argue that s 29 bars the grant of an interlocutory or even an interim injunction against the Government. (Emphasis added.)

[28] So there is no reason to strike out MINDEF as a party on this ground either.

[29] With regard to Encik Taufik's third point, I find that he is on firmer ground here. It was argued by Mr Shankar Ram of counsel for the plaintiff that the plaintiff can sue MINDEF (the Government) because the first plaintiff had entered into the Main Contract with MINDEF. According to counsel, since the plaintiff had entered into the partnership agreement and supplementary agreement with the first defendant, the plaintiff can claim ''rights under the main contract with the fourth defendant ie MINDEF. I do not agree with this submission. The plaintiff is a complete stranger to the main contract entered into between the first defendant and MINDEF. By the partnership agreement and supplementary agreement the plaintiff may have acquired certain rights against the first defendant concerning the main contract, in that, the subject matter of their 'joint-venture' so to speak concerns the main contract, but not being a contracting party with MINDEF (Government), the plaintiff has no legal right to enforce directly against MINDEF (Government). It is plain for me to see from the facts and documents before the court that the real dispute is between the plaintiff and the first, second and third defendants and that such disputes arise out of the partnership and supplementary agreement, not the main contract, in that, the parties dispute about where and to whom the moneys earned under the main contract are to be paid to as a result of their having entered into the partnership agreement and supplementary agreement. That is of no concern of MINDEF (Government). MINDEF may have been willing to give effect to the notices of assignment it received but that does not mean that the plaintiff has acquired any legal right against MINDEF (Government).

[30] Mr Shankar Ram submitted that the plaintiff can rely on s 26(b) of the Specific Relief Act 1950 to seek specific performance of the main contract against MINDEF. I do not agree with this submission. The provisions of s 26(b) can have no application to the facts of this case. That section allows specific performance against 'any other person claiming under a party to the contract by a title arising subsequent to the contract. MINDEF or the Government is not such a party. As far as the main contract is concerned, MINDEF or the Government is a party to that agreement in its own right and does not need to claim 'under a party' to it if it wishes to enforce any rights in the main contract, but as I said, as between the plaintiff and MINDEF or Government, there is simply no privity of contract to enable the plaintiff to bring this action or to claim any relief against MINDEF or the Government. The plaintiff simply has no cause of action against MINDEF or the Government.

[31] With regard to the case of *TSB Private Bank International SA v Chabra & Anor* [1992] 1 WLR 231 which was relied on by Mr Shankar Ram, I find that what was said there has no application here. In that case, it was held that an injunction could be granted against a co-defendant against whom no cause of action lay, provided that the claim for injunction was ancillary and incidental to the plaintiff's cause of action against the other co-defendant. On the facts of that case, it was found that since the

injunction made against the first defendant alone there was inadequate to protect the plaintiff, it was appropriate to grant the injunction against the second defendant in support of the existing legal right claimed by the plaintiff against the first defendant there. But I do not see that an injunction, if granted against the first, second and third defendants here is inadequate to protect the plaintiff. MINDEF has acted with an even hand between the plaintiff and defendants. I am confident that if MINDEF is made aware of and served with the terms of any injunction granted against the first, second and third defendants MINDEF (Government) would not make payment of the proceeds under the main contract contrary to or in defiance of the terms of such injunction.

[32] For the above reasons, I uphold the third ground of objection raised by Encik Taufik. I find that MINDEF (Government) was wrongly joined as the fourth defendant in this suit. I order that it be struck out forthwith as a party to this action, with costs.

[33] Returning now to the plaintiff's inter partes application for interim relief, the approach that I should take in deciding this application is set out for my guidance by the Court of Appeal in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193. Briefly stated, that case held that at this stage of the case the questions I should ask myself are first, whether the totality of the facts presented before me discloses a bona fide serious issue to be tried; if so, then I should go on to consider where the justice of the case lies. In making this assessment, I must take into account all relevant matters, including the practical realities of the case. Further, I must keep in the forefront of my mind that the remedy that the court is asked to administer is discretionary, intended to produce a just result for the period between the date of this application and the trial proper and to maintain the status quo. With that, I turn to consider the questions that I need to ask myself.

IS THERE A BONA FIDE SERIOUS ISSUE TO BE TRIED?

[34] Although the immediate dispute between the parties concerns who should receive the moneys payable under the main contract and into which account such moneys should be paid, at the heart of the dispute between the plaintiff and the first, second and third defendants lies the partnership agreement and the supplementary agreement. This is so because on the one hand, while the plaintiff contends that by trying to divert the proceeds of the main contract into the first defendant's own account at Bumiputra-Commerce Bank the first defendant had acted in breach of the partnership agreement and that the second and third defendant had acted in breach of their fiduciary duties as directors of the sixth defendant; on the other hand, the first, second and third defendants deny that they have so acted, and instead assert that the first defendant was entitled to request MINDEF to pay the proceeds of the main contract into its account at Bumiputra-Commerce Bank as the partnership agreement and supplementary agreement have been terminated since 12 January 2005. The plaintiff has, however, in the affidavits filed on its behalf in these proceedings, seriously disputed that the partnership agreement and supplementary agreement have been so terminated or that the first, second and third defendants have the right to do so.

[35] The first, second and third defendants maintain that they had the right to terminate the partnership agreement and the supplementary agreement because the plaintiff had failed to fulfil its obligation to provide the necessary financing to undertake the main contract by the sixth defendant, but this is disputed by the plaintiff. The plaintiff says it has procured or provided in February 2004 an advance payment bond for RM1,000,000.00 and a security bond for RM200,385.00 in favour of MINDEF. The plaintiff says it is a surety to these bonds and are exposed to liability under them should MINDEF call on these bonds under the Main Contract. The plaintiff further says that in 2003 and 2004, it contributed, whether directly or indirectly through the 6th defendant, towards the construction of facilities and the provision of amenities at the Bukit Saban Camp site costing some RM3,179,365.60. The plaintiff says that todate its total gross outlay in the partnership business is some RM5,319,171.68. Accordingly the plaintiff denies that it is in breach of the partnership agreement or supplementary agreement, which it maintains has not been lawfully terminated. In particular the plaintiff asserts that whatever complaints the first, second and third defendants may have had against it regarding the partnership agreement and supplementary agreement, all such allegations had been withdrawn by the first defendant at the meeting held at MINDEF on 14 March 2005 where the first defendant even agreed to withdraw the first suit and the injunction it had obtained against the plaintiff. In such circumstances, the plaintiff says the first defendant cannot resile from its earlier agreement. According to the plaintiff, the defendants cannot now be heard to say that the partnership agreement and supplementary agreement had been terminated.

[36] From the totality of the facts before me, I find the question whether the partnership agreement and supplementary agreement has been lawfully terminated discloses a bona fide triable issue, which it is not suitable or appropriate to decide at this stage of the case. I also find that to arrive at a finding on the above issue the court will have to consider and decide on facts which are seriously disputed, such as, whether the main contract is an asset of the sixth defendant or whether the plaintiff was in breach of its obligation to provide the necessary financing to enable the main contract to be undertaken through the sixth defendant which question must be considered in the light of the plaintiff's assertion that it has so far incurred a gross outlay of some RM5,319,171.68 towards the partnership business. At the moment, the plaintiff's assertion that it is not in breach of its obligations under the partnership agreement and that it had expended these large sums of money cannot be dismissed out of hand because they must be considered against a background where the first defendant had agreed to withdraw all its allegations against the plaintiff at the meeting at MINDEF on 14 March 2005. It will be recalled that the reason given by the first defendant for terminating the partnership agreement on 12 January 2005 was the alleged failure of the plaintiff to provide the required financing for the main contract. Since the first defendant agreed to withdraw all its allegations against the plaintiff at the MINDEF meeting on 14 March 2005, would this not have included the allegation that the plaintiff had failed to provide the necessary financing as well? Of course, the first defendant now says that it intends to pursue with the first suit, but for present purposes the plaintiff's contention that the principal agreement and supplementary agreement have not been terminated is a fairly arguable proposition.

[37] Quite apart from the above, the first, second and third defendants have questioned, in these proceedings, the basis upon which the plaintiff was able to obtain a loan of RM3m from Bank Pembangunan Dan Infrastruktur Malaysia Bhd the fifth defendant herein, which loan the plaintiff maintains was raised for the sixth defendant's purposes. According to the defendants, it was on the strength of the sub-contract agreement and the first notice of assignment that the plaintiff obtained the loan from the fifth defendant, but the defendants say the sub-contract agreement and first notice of assignment is invalid and void as it was not authorised by the first defendant's Board of Directors nor executed by the first defendant. In my view, the assertion of the defendants regarding the validity of the sub-contract and the first notice of assignment are not matters which are suitable to be decided at this stage of the proceedings. They give rise to serious issues that need to be investigated further because: (a) the plaintiff maintains that the sub-contract was entered into for the purpose of raising finance for the partnership business; and (b) the first notice of assignment was signed by one Awangku Mohd Salleh Bin Pengiran Syed Shahminan a former director of the first defendant. He has come forward to say that the first, second and third defendants had agreed to him doing so. In the light of these seriously disputed facts, it is not appropriate to decide the issue here.

[38] Having found that there is a bona fide serious issue that requires to be tried, I now move on to consider where the balance of justice lies in this case.

THE BALANCE OF JUSTICE

[39] In making my assessment on this aspect of the application I have taken into consideration the following matters:

Are damages an adequate remedy?

[40] It is the contention of the defendants that an injunction should not be granted to the plaintiff because by cl 13(b) of the partnership agreement, on its termination the plaintiff's claim is contractually limited to obtaining a refund of its 'total advancement made' to the sixth defendant at the date of breach of the partnership agreement. Accordingly, the defendants contend that since compensation in money is an adequate relief to the plaintiff, the plaintiff should be left to its remedy in damages in the event it wins this case by reason whereof the court should hold that the partnership agreement is not specifically enforceable under s 20(1)(a) of the Specific Relief Act 1950.

[41] I do not find this to be so. The entitlement of the plaintiff to compensation for a breach of the partnership agreement only represents one aspect of the consequences that flows from the breach. If an injunction is not granted at this stage, and the proceeds of the main contract are diverted into the hands of the defendants solely, it is not only the rights of the plaintiff under the partnership agreement which will be affected, other consequences also flow. The operations of the sixth defendant will be severely affected if it is starved of funds to manage and operate the main contract. Not only will the existence of the sixth defendant be placed in jeopardy, so too will the main contract if the sixth defendant cannot function effectively and efficiently in providing the services and amenities required under the main contract.

I do not regard damages as an adequate remedy for the plaintiff if the sixth defendant is forced to fold-up its operations or the main contract is lost forever to the partnership business.

[42] On the converse hypothesis, if the defendants were to eventually succeed at the trial, it is my view that damages would be an adequate remedy for them. The sixth defendant would have continued to undertake the main contract and it would then be a question of assessing what damages are payable by the plaintiff to the defendants for having breached the partnership agreement. In this regard the defendants have not questioned the ability of the plaintiff to meet its undertaking in damages.

Has the plaintiff a cause of action and locus standi?

[43] It was contended by the defendants that an injunction should not be granted to the plaintiff as it is seeking to enforce rights belonging to the first defendant under the main contract to which it is not a party. Hence the defendants contend that the plaintiff has no cause of action against the defendants and no locus standi to bring this action. I do not agree. What the plaintiff complains about here is the alleged breach by the first defendant of the partnership agreement to which it is a party. As against the second and third defendant, the plaintiff, as a party entitled to 70% of the equity in the sixth defendant, alleges that they are in breach of their fiduciary duties towards the sixth defendant as directors thereof. In my view, not only have sufficient facts been pleaded by the plaintiff, but also sufficient details and particulars have been disclosed in the affidavits about the first defendant, acting through the second and third defendants, trying to divert the proceeds of the main contract away from the sixth defendant and into the first defendant's account, to disclose a cause of action against the first defendant for breach of the partnership agreement and against the second and third defendants for breach of their fiduciary duties towards the sixth defendant. As I said, the plaintiff is not only a contracting party as far as the partnership agreement is concerned but also entitled to a 70% interest in the sixth defendant's equity. Accordingly, there is no question that the plaintiff has locus-standi to file this suit.

Prohibition against first assignment and no consent for first assignment

[44] The defendants point out that the main contract contains a prohibition against the first defendant assigning away its rights under the contract without MINDEF's prior consent. According to the defendants, not only was the first notice of assignment made without MINDEF's consent, it was also made without the first defendant's consent. Therefore it is invalid and ineffective. I see nothing in the point taken in the context of the balance of justice in this case. In the first place, the first notice of assignment was signed by Awangku Mohd Salleh Bin Pengiran Syed Shahminan as a former director of the first defendant. Although the defendants dispute his authority to have done so, he has affirmed an affidavit in these proceedings saying that the defendants agreed to him doing so. The court is not in a position to decide this issue on affidavit evidence which is disputed. Until the court does so, the defendants' contentions about lack of authority or that it had not given its consent to the first assignment cannot be taken into the weighing when considering the balance of justice. In the second place, MINDEF is well aware of how

the main contract is being carried out and where the proceeds of the main contract were being paid to because on 3 March 2005 MINDEF wrote to the fifth defendant to say that it had no objection to the proceeds under the main contract being assigned to the fifth defendant. MINDEF also indicated in the same letter that such payment to the fifth defendant was supported by the first notice of assignment dated 23 February 2004. Further, it will be recalled that after the first defendant here filed the first suit and obtained an injunction against the plaintiff here, a meeting was held between the disputing parties at MINDEF on 14 March 2005. As MINDEF was well aware that the proceeds of the main contract had been assigned away and had no objection to it, I do not see how the point now taken by the defendants can be an impediment against the grant of an injunction in this case.

No averment that plaintiff is ready to perform contract

[45] It was contended by the defendants that the plaintiff's statement of claim is fatally flawed as it does not contain an averment that the plaintiff is ready and willing to perform its part of the partnership agreement and supplementary agreement, therefore the plaintiff has no cause of action for the specific performance it prays for in prayer (22) of the statement of claim.

[46] I see nothing in this point. It raises a point of pleading. It is raised during interlocutory proceedings when the pleadings are usually incomplete. While it is true that the plaintiff's statement of claim does not contain an averment that it is ready to perform its part of the contract, such an averment is in fact contained in its reply and defence to counterclaim. While it is desirable that the averment should have been made in its statement of claim, what possible prejudice could the defendants have suffered by the plaintiff having made the averment in its reply and defence to counterclaim? I cannot see any and the defendants have not been able to show any, apart for raising it as a point of pleading. In the circumstances, I do not find the plaintiff's pleadings fatally flawed as alleged. Even if the plaintiff had not made the averment in its reply and defence to counterclaim, I am of the view that the plaintiff is at liberty to apply to amend its statement of claim to do so.

The partnership agreement and supplementary agreement are not specifically enforceable

[47] It was contended by the defendants that the plaintiff should be refused the injunction and other reliefs prayed for in this application because it is seeking to restrain the breach of a contract which is not specifically enforceable. According to the defendants, such relief is not available because s 54(f) of the Specific Relief Act 1950 states that:

> 54 An injunction cannot be granted:
>
> ……..
>
> (f) to prevent the breach of a contract the performance of which would not be specifically enforced

[48] According to the defendants, the partnership agreement and the supplementary agreement are not specifically enforceable because:

(a) compensation in money would be an adequate relief for the plaintiff if these agreements were breached. I have already dealt with this point earlier and will not repeat here what I said about damages not being an adequate remedy for the plaintiff;

(b) they require the constant supervision of the court and the employment of persons with personal qualifications for a period longer than three years and is therefore caught by s 20 (1) (b) and 20 (1) (g) of the Specific Relief Act. I see nothing in the point taken. Under the scheme of the National Service training programme, it is MINDEF which provides the specialised personnel who conduct the training and instruct the youth. What the 6th defendant provides is the infrastructure, buildings and amenities. By all accounts these are already in place. Accordingly the defendants' argument about the partnership agreement and supplementary agreement requiring minute and constant supervision with the provision of persons with qualifications comes to nought.

[49] Quite apart from what I have just said, I should point out that the same arguments which the defendants have raised here about s 54 of the Specific Relief Act and s 20(1)(b) and s 20(1)(g) of the same Act were also raised, but firmly rejected as capable of constituting a reason to refuse the grant of an interim injunction by the Federal Court in [1985] 1 MLJ 132. The decision in Si Rusa Beach Resort found specific mention by the Court of Appeal in *Keet Gerald Francis Noel John v Mohd. Noor Bin Abdullah (supra)* when discussing the correct approach to be adopted by the Court and the stages of reasoning involved in the process of arriving at a conclusion as to whether interlocutory injunctive relief should be granted or withheld. In *Keet Gerald Francis Noel John*'s case, this is what the Court of Appeal said (per Gopal Sri Ram JCA) at p 203:

> In *Sri Rusa Beach Resort Sdn Bhd v Asia Pacific Hotels Management Pte Ltd* [1985] 1 MLJ 132, the plaintiff and defendant entered into an agreement under which the plaintiff was to manage the defendant's hotel for a period of ten years. Disputes having arisen, the plaintiff obtained an ex paret interim injunction restraining the defendant from interfering with the plaintiff's running of the defendant's hotel. An application to set aside that injunction having been refused, the defendant appealed to the Federal Court. On appeal it was argued that the agreement in question being for a period longer than three years, it could not be specifically enforced. Reliance was placed on s 20(1)(g) of the Specific Relief Act 1950 which provides as follows:
>
> The following contracts cannot be specifically enforced:
>
> a contract the performance of which involves the performance of a continuous duty extending over a longer period than three yeras from its date;
>
> Counsel for the defendant then submitted that by reason of s 54(f) of the Specific Relief Act 1950, no injunction (meaning a permanent injunction) could be granted to prevent the breach of a contract not specifically enforceable. It was then argued, relying on the decision in *Vethanayagam v Karuppiah & Ors* [1968] 1 MLJ 283 that an interim injunction cannot be granted if a permanent injunction did not lie.

These arguments, which appeared to provide a complete answer to the plaintiff's claim on merits, were rejected by the Federal Court.

Abdul Hamid CJ (Malaya), delivering the judgment of the court said at p 135:

While we appreciate that these questions are crucial indeed they are the main grounds upon which the appellant's case rests, we do not, however, see the necessity at that stage for the learned judge to decide on these difficult points of law.

Suffice for the learned judge to decide, and this he did, that there are serious questions that have arisen for trial. While we agree that there are serious questions of law we are also of the view that these questions are relevant for consideration in determining the grant or otherwise of an interim injunction but the question is should it be the court's business to resolve these serious and difficult questions of law at that stage of the litigations? We think not.

[50] Accordingly, the question whether the partnership agreement and supplementary agreement are specifically enforceable in the light of s 54(f), s 20(1)(b) and s 20(1)(g) of the Specific Relief Act 1950 are not suitable to be decided at this stage of the case.

The first defendant taking over the camp site

[51] There is uncontroverted evidence that after the plaintiff filed this suit and obtained its ex parte injunction on 19 December 2005 to restrain the first, second and third defendants from receiving the proceeds of payment under the main contract, the first defendant sent in its security guards to take over the Bukit Saban Camp site on or about 31 December 2005. The plaintiff has vehemently complained about what the first defendant has done and says this is another good reason why the injunctive relief sought in this application should be granted.

[52] The first defendant has sought to justify its taking over of the training camp on the ground that it has terminated the partnership agreement and supplementary agreement. It also says that its presence at the camp site cannot be regarded as unlawful or as a trespass because it is they who are the contractors under the main contract and had made available the camp site to MINDEF. I do not agree with these arguments. In the first place, even though it may be the contracting party in the main contract, as far as its relationship with the plaintiff is concerned it cannot pretend and behave as if the partnership agreement and supplementary agreement do not exist. Under these agreements it was the sixth defendant who was entrusted to undertake and operate the main contract at the Bukit Saban camp site and, therefore, entitled to its control and possession. Although the first defendant alleges that it has terminated the partnership agreement and supplementary agreement, this is seriously challenged by the plaintiff. Further, the first defendant has at the meeting at MINDEF on 14 March 2005 agreed to withdraw all allegations against the plaintiff including the first suit. As I said before, the question whether the partnership

agreement and supplementary agreement have been validly terminated gives rise to a bona fide serious issue to be tried. Until that question is decided, it would be unjust to allow the first defendant to steal a march on the plaintiff by taking over the camp site and behaving as if the partnership agreement and supplementary agreement has in fact been terminated and causing difficulties to the sixth defendant in performing the main contact. In the second place, even though it may have been the first defendant who made available the camp site to MINDEF under the main contract, the question of maintaining security at the camp site should be a matter for the sixth defendant who operates and manages the main contract on behalf of both the plaintiff and first defendant. Accordingly, the first defendant's excuse for taking over the camp site is not acceptable to me. I also find its argument about not being a trespasser irrelevant here in the context of the plaintiff's complaint, which is that pending the resolution of the question whether the partnership agreement and supplementary agreement have been terminated, it is wrongful for the first defendant to take over possession of the camp site from the sixth defendant who has been given possession of it by virtue of the partnership agreement and supplementary agreement.

Unclean hands

[53] It is the first defendant's complaint that the plaintiff should be refused the injunctive relief that it seeks because it has offended against the maxim 'he who comes to equity must come with clean hands'. The first defendant says the plaintiff comes to court with unclean hands, because firstly, it was said that the plaintiff had throughout its negotiations with the first defendant on the assignment of the proceeds of the main contract to finance the works during the period 22 October 2004 to 29 December 2004, suppressed and concealed from the first defendant that it (the plaintiff) was in possession of the first notice of assignment signed by the first defendant's former director Awangku Mohd Salleh Bin Pengiran Syed Shgahminan. I see nothing in this point. Contrary to what the first defendant alleges, Awangku Mohd Salleh has come forward to say that the first defendant did know of the first notice of assignment. So it is not possible at this stage of the case to decide whether the plaintiff has behaved in the manner the defendants accuse it of.

[54] Secondly, it was said that the plaintiff had unclean hands because (i) the plaintiff obtained the loan facility of RM3m from the fifth defendant knowing that the first defendant's Board of Directors had refused to agree to an assignment of the proceeds of the main contract, and (ii) the assignment of proceeds of the main contract had not received the prior consent of MINDEF. I do not see how it can be said that these matters show the plaintiff has unclean hands. In the first place the plaintiff was granted the RM3m facility by the fifth defendant on the strength of the first notice of assignment which, according to the first defendant's former director Awangku Mohd Salleh, the first defendant had agreed to. In the second place, MINDEF said it had no objection to the assignment of the proceeds of the main contract to the fifth defendant even though its prior consent had not been sought to the assignment. So I do not agree that the plaintiff has unclean hands as alleged.

[55] Thirdly, it was said that the plaintiff had obtained the loan facility of RM3m from the fifth defendant on the security of the proceeds of the main contract in its own name and not that of the sixth defendant. It was further said that the plaintiff

had paid some RM1,715,347.20 received from MINDEF into its account at the fifth defendant's bank. Accordingly, the defendants complained that the sixth defendant had no control over the utilisation of this facility. I see nothing on this point. The plaintiff does not deny that it had done these things but says that the loan was for the benefit of the sixth defendant and the account it operates is for the benefit of the sixth defendant as well. Whether what the plaintiff says is true or not is a matter that cannot be decided here. Besides the first defendant had agreed to the arrangement when it gave MINDEF the first notice of assignment in favour of the fifth defendant. I do not see how, at this stage of the proceedings, the first defendant can say the plaintiff's hands are unclean.

Full and frank disclosure

[56] It is alleged by the defendants that in applying for ex parte relief the plaintiff had not made full and frank disclosure on such matters like it having received payment of RM1,715,347.20 from MINDEF which was paid into its own account at the fifth defendant's bank and not into the sixth defendant's bank account. It was also said that the plaintiff had not disclosed to the court the full particulars about various accounts that were supposed to be opened at various banks for the partnership business. I see nothing in the point taken. I agree with counsel for the plaintiff that the amount of RM1,715,347.20 which the plaintiff refers to was part of the moneys paid out by MINDEF until about 25 October 2005 under mutual arrangements that had been made between the parties after the meeting at MINDEF on 14 March 2005 when the first defendant withdrew all allegations against the plaintiff. The first, second and third defendants were obviously happy to go along with the way the proceeds under the main contract were being divided on its receipt from MINDEF. It therefore lies ill in the mouth of the defendants to now accuse the plaintiff of not disclosing where the money was paid to. The defendants also complained that the plaintiff had failed to disclose to the court that the defendants had made substantial payments towards performance of the main contract which they say amounts to some RM1.4m, or to disclose that in respect of the advanced payment bond and the security bond which it provided to MINDEF the plaintiff had only paid an amount equivalent to 20% of their value to do so, with the balance coming from payments received from MINDEF. The plaintiff disputes and denies these allegations, but even if true I do not regard them as material non-disclosure which would have materially affected the exercise of the court's discretion in granting the ex parte order to the plaintiff on 19 December 2005. The question before the court then was whether there was a real danger that the defendants would divert the RM1.5m which MINDEF was ready to pay, into the first defendant's own account. The matters allegedly not disclosed were not material to that question and even if disclosed could not have affected the exercise of the court's discretion in granting the ex parte order.

[57] With regard to the complaint that the plaintiff had not disclosed to the court that some of the reliefs which it claims in this suit are already claimed by it in its counter claim in the first suit, I should point out that the plaintiff did in its certificate

of urgency make disclosure about the first suit. Further, the injunction it claims in this action is to restrain the defendants from diverting the RM1.5m receivable from MINDEF. This is not a matter covered in the first suit. Accordingly I do not find that there has been a failure on the plaintiff's part to make full and frank disclosure as alleged.

Delay

[58] According to the defendants the plaintiff should not be granted the interim injunction it seeks because it has failed to act with promptitude. The defendants say the plaintiff has been guilty of reasonable delay in coming to court because:

(i) the first defendant had terminated the partnership agreement and supplementary agreement on 21 January 2005;

(ii) the plaintiff knew by 6 May 2005, when it would have received the first defendant's lawyer's letter informing it so, that the first defendant intended to pursue with its earlier action in the first suit. As a result of this letter, the plaintiff's then lawyer wrote back threatening to apply for 'injunctive reliefs';

(iii) on 2 September 2005 the first defendant had written to MINDEF for the proceeds of the main contract to be paid into its account.

[59] Accordingly, it is the submission of the defendants that if time is to be reckoned from the time of termination of the partnership agreement and supplementary agreement, the delay in seeking relief is eleven months. If time is to be reckoned from the first defendant's notice given on 6 May 2005 informing the plaintiff that it intended to pursue with the first suit, the delay is at least six months. If time is to be reckoned from 2 September 2005 when the first defendant gave instructions to MINDEF to pay the proceeds of the main contract into its own account, then the defendant say there is an unexplained delay of three months.

[60] I do not agree with this submission of the defendants. I find that the plaintiff has not delayed in coming to court for relief. I say so for the following reasons. It must not be overlooked that despite the first defendant having allegedly terminated the partnership agreement on 21 January 2005, and thereafter withdrawing all its allegations against the plaintiff including the first suit, but deciding on 6 May 2005 to continue with the first suit, the first defendant did not take any steps to divert the proceeds of the main contract until 3 August 2005 when it wrote to MINDEF to cancel the first notice of assignment, but this was not known to the plaintiff. The plaintiff only discovered the first defendant's attempt to divert the money on 2 September 2005. But what is of importance is that on learning of the first defendant's attempt to divert the moneys, the plaintiff did not remain silent or sit on its rights. The plaintiff immediately protested to MINDEF in the strongest possible terms. It wrote two letters to MINDEF on 19 September 2005 and 21 October 2005. And it seems that the plaintiffs remonstrations were successful because after that on 25 October 2005 MINDEF made two further payments of the proceeds of the main contract to the plaintiff's account with the fifth defendant. It was after

11 November 2005 when the first defendant wrote to the plaintiff stating that it (the first defendant) had terminated its relationship with the sixth defendant and that the sixth defendant 'has no longer any authority to deal with and/or manage' the main contract that the plaintiff sought the protection of the court. When viewed properly in the light of the events I have just described, I do not find any delay on the part of the plaintiff in having come to court by 19 December 2005.

Practical realities

[61] In arriving at an assessment of where the balance of justice lies in this case, I cannot ignore the practical realities before me. Here the parties had agreed for the sixth defendant to operate and manage the main contract. It has been doing so and by all accounts it has done so successfully because if it had not MINDEF would not pay out the large sums of money it has under the main contract. But first defendant has embarked on a course of action which will prevent the sixth defendant from carrying out the main contract. It has taken steps to divert the proceeds of the main contract into its own account and in effect away from the sixth defendant. It has also taken over possession of the camp site. Given the above situation, on the totality of the facts before me, in my judgment if the defendants are not restrained from diverting the proceeds under the main contract to their own account and the status quo is not restored to the situation that prevailed at the camp site before the first defendant took it over, then far greater harm would result by the refusal of the injunction sought than by its grant.

[62] For all the above reasons, I grant an injunction to the plaintiff in the terms hereafter set out.

[63] I now turn to consider the plaintiff's application for the appointment of a receiver and manager in respect of the sixth defendant. The plaintiff says that unless there is such an appointment the sixth defendant would not be able to function properly and effectively undertake and manage the main contract especially as the parties are now at a deadlock in the sixth defendant. Given the fact that the defendants are trying to divert the proceeds of the main contract and have taken over possession of the camp site, the plaintiff says that there is an urgent and real need for the appointment of a receiver and manager in respect of the sixth defendant. According to the plaintiff, a receiver and manager would be the best person pending the trial to manage and protect the main contract which, according to the plaintiff is an asset of the sixth defendant.

[64] The defendants object to the appointment of a receiver and manager on several grounds. They first say that there are no valid reasons to justify such an appointment because the partnership agreement and supplementary agreement has been terminated; that the first defendant is entitled to possession of the camp site; that there has been delay on the part of the plaintiff in coming to court; that there is no dissipation of assets and contrary to the plaintiff's contention the main contract was never an asset of the sixth defendant. With the exception of the point that the main contract is an asset of the sixth defendant, I have already dealt with and expressed my views on each of the other reasons given by the defendants for objecting to the appointment of a receiver and manager. It suffices that I say that for the reasons

I have already given I do not agree with the defendants' contentions. With regard to the contention that the main contract is an asset of the sixth defendant, it is my view that it is not suitable to decide this question at this stage of the proceedings.

[65] It was next said that since the plaintiff is not seeking a dissolution of the partnership business, there ought not to be an appointment of a receiver and manager. In support of what he said counsel for the defendants referred me to the following passage in *Lindley & Banks on Partnership* (18th Ed) para 23-156 where it is stated:

> The general reluctance of the courts to interfere between partners otherwise than with a view to dissolution has already been noticed, and is nowhere more apparent than in the present context. Indeed, Lord Lindley wrote:
>
> Court of justice are by no means anxious to take upon themselves the management of a partnership business, and they will, it is said, never do so, save with a view to a dissolution or final winding up of the affairs of the concern.
>
> This rule still appears to hold good in the case of applications for the appointment of a receiver and manager, since there is no reported instance in which such an appointment has been made in the case of an ongoing partnership. Indeed, in such cases as have come before the courts, relief has always been refused.

[66] In my view, the above passage reflects 'the general reluctance' of the courts, but it is also my view that each case must be decided on its own particular facts. On the facts before me, to refuse the appointment of a receiver and manager simply because the plaintiff has not asked for a dissolution of the partnership business would result in the sixth defendant suffering dire consequences. It would leave the sixth defendant in a precarious position since, according to counsel for the plaintiff, the affairs of the sixth defendant are in a situation of deadlock with the ongoing dispute and impasse between the plaintiff and defendants. Further as I said earlier the operations of the sixth defendant will be severely affected if it is starved of funds to manage and operate the main contract. Not only will the existence of the sixth defendant be placed in jeopardy, so too will the main contract if the sixth defendant cannot function effectively and efficiently in providing the services and amenities required under the main contract. If the sixth defendant is forced to cease its operations there is a danger that the main contract will be lost forever to the partnership business. As the sixth defendant is not at any fault in this whole dispute and it is the party that is earning the proceeds under the main contract it is my view that it is imperative to keep it as a going concern by the appointment of a receiver and manager.

[67] It was next said by the defendants that if a receiver and manager is appointed it would in effect be deciding disputed rights or prejudging the action itself. I do not agree. The appointment is being made to keep the sixth defendant going as a viable concern. No decision is being made regarding the facts in issue as alleged. In fact the appointment of a receiver and manager would not involve the court in coming to any decision regarding the bona fide serious issues which have been identified for trial.

[68] It was lastly said that the appointment of a receiver and manager would cause hardship to both parties as it will be a costly affair. It hardly lies in the mouth of the defendants to raise this complaint. From all I have said so far, it is the defendants who have brought this hardship on the parties by their act of trying to divert the proceeds of the main contract, starve the sixth defendant of funds to operate, and make it difficult for the sixth defendant to operate the main contract by taking over possession of the camp site.

[69] For all the above reasons, I would grant the plaintiff's application for the appointment of a receiver and manager.

[70] In the result I grant the plaintiff's application with costs and make the following orders:

(a) An Order that the first, second and third defendants be restrained and an injunction be hereby granted restraining the first, second and third defendants until the trial of this action or judgment whether by their agents servants, directors or any other means howsoever from dealing with the proceeds of payment from MINDEF under the main contract except in the manner set out in item (b) and (c) below or diverting or dissipating the proceeds of payment from MINDEF under the main contract;

(b) Consequent to (a) above, an order that the first, second and third defendants by each of them their agents servants and/or directors to pay all proceeds received from MINDEF under the main contract to the fifth defendant or the sixth defendant or to the receiver and manager of the sixth defendant

(c) An order that the first, second and third defendants and each of them do forthwith on the making of this order instruct MINDEF to continue to pay all proceeds under the main contract to the fifth defendant.

(1) An order that the first, second and third defendants and each of them be restrained and an injunction is hereby granted restraining the first, second and third defendants and each of them until further order or until trial/judgment whether by their agents servants, directors or any other means howsoever from interfering with or preventing the sixth defendant or its employees and the said receiver and manager carrying out their duties;

(2) An order that Mr David Wong Siew Chow of Moores Rowland, Kuching be appointed as a receiver and manager, without security, of the sixth defendant to manage generally the affairs of the sixth defendant pending the trial of this action or pending judgment, and specifically to

(a) collect, get in, receive and store all assets, properties, effects of businesses, monies, stock-in-trade, securities, deeds, books, documents and papers of or in the name of the sixth defendant (solely or otherwise) or in which the sixth defendant have any interest, legal or otherwise, in particular but

A without prejudice to the generality of the foregoing all property presently stored at the premises known as the camp site or first lot, referred to in the supplementary agreement dated 21st April, 2004 or stored elsewhere

(b) collect, get in and receive all land any debts or receivables now or at anytime hereafter due and owing to the sixth defendant (solely or otherwise)

B

(c) pay, settle and/or compromise all and any debts or liabilities now or at anytime hereafter due and owing by the sixth defendant (solely or otherwise)

C

(d) otherwise do all things reasonably necessary to manage the sixth defendant's business pending the trial of this action or pending judgment;

(3) An order for the parties, whether by themselves, their agents, servants or otherwise do forthwith deliver to the receiver and manager of the sixth defendant all assets, properties, effects of businesses, monies, stock-in-trade, securities, deeds, books, documents, papers and keys to all relevant premises and to permit the said receiver and manager, whether by himself, his agents, servants otherwise access to all relevant premises of the sixth defendant

D

E (4) An order that there is an inquiry into the accounts of the sixth defendant by the receiver and manager or such other independent third party;

(5) An order for the said receiver and manager, whether by himself, his agents, servants or otherwise be at liberty and are permitted to do all such acts and things necessary for the purposes described in paragraphs three to five above, without limiting the generality of the foregoing, including:

F

(a) the right to enter upon the premises where the sixth defendant's business are being carried out, namely:

(i) Camp Site or 1st Lot, referred to in the supplementary agreement dated 21st April, 2004, and

G

(ii) No 46A, Jalan Tunku Ampuan Zabedah A9/A, Seksyen 9, 40000 Shah Alam, Selangor Darul Ehsan

(b) the power to appoint/retain solicitors to advice and/or act on behalf of and at the expense of the sixth defendant

H

(6) An order that the receiver and manager to submit accounts as required by O 30 r 4 of the Rules of Court at intervals of six months, commencing from six months from the date of the order made herein.

I (7) An order that the receiver and manager need not pay into court such balance as required by O 30 r 5 of the Rules of Court.

(8) An order for that at intervals of one calendar month, commencing from one month from the date of the order made herein, the receiver and manager may pay himself on account of his fees and costs from funds received in his hand

or the assets of the sixth defendant such amount as either may be agreed by both the plaintiff and the first defendant or may be certified/allowed by Court.

Order accordingly.

Reported by Peter Ling